No. 86-704

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the United States Supreme Court review a garden variety state court judgment, which reversed a criminal conviction for evidentiary insufficiency on adequate and independent state grounds, when the decision below neither rests on nor construes any federal issue and when Petitioner did not raise any federal issue in the court below?

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STATEMENT OF THE CASE

A. Introduction

Respondent accepts the facts as set forth by the Minnesota Supreme Court at 392 N.W.2d 876.

On March 21, 1986, the Minnesota Supreme Court unanimously reversed Orville Skip Berndt's convictions because " . . . the evidence was insufficient to sustain the convictions." (Unpublished Slip Opinion, at 2). That opinion did not rest on or construe any federal issue. The State of Minnesota filed a petition for rehearing asking the Minnesota Supreme Court to remand the case for retrial. In its petition for rehearing, the State of Minnesota did not raise any federal issue. Quite the contrary: The State of Minnesota assured the Minnesota Supreme Court that retrial was permissible. The State also reminded

the Court that it had "repeatedly held" that circumstantial evidence should be given the same weight as other types of evidence so long as the circumstances proved are consistent only with guilt and inconsistent with any other rational hypothesis. The State did not argue that this standard violated any federal rule. The State argued that the evidence satisfied that standard. The petition for rehearing was denied on August 29, 1986. On that date, the Minnesota Supreme Court withdrew its opinion of March 21, 1986, and again unanimously reversed Skip Berndt's convictions because " . . . the evidence was insufficient to sustain the convictions." State v. Berndt, 392 N.W.2d 876 (Minn. 1986). This decision of the Minnesota Supreme Court did not rest on or construe any federal issue. The Court made this clear in the following footnote to its

decision:

> In addition to raising the insufficiency of the evidence issue, appellant [Berndt] has alleged violation of discovery rules, an unconstitutional search, and deprivation of a fair trial. Our disposition makes it unnecessary to address those issues.

Berndt, fn. 1 at 876. The State of Minnesota now asks this Court to reinstate the convictions because retrial is prohibited and because the circumstantial evidence standard was improper.

B. Orville Berndt Is Innocent Of These Crimes, The Government Failed To Prove His Guilt, And A Unanimous Minnesota Supreme Court Has So Held.

On August 20, 1981, Skip Berndt returned home from work at approximately 6:00 p.m. (Trial Transcript, p.1119, hereinafter cited as "T"). He worked at Continental Baking Company as a sales supervisor (T.1109). As Skip changed his clothes, his wife Brenda cooked a pizza

for the children for supper. Because the smoke alarms in the townhouse complex were overly sensitive and the exhaust ventilation was very poor, the residents frequently disconnected them when using the ovens (T.282). Skip did this (T.1119).

Skip and Brenda then left to meet with their automobile insurance carrier so that a used car they had recently purchased could be properly insured (T.1120). After taking care of the insurance, they had a night out with friends to celebrate the car purchase. After visiting two bars, they ended up at the Earle Brown Bowl. They arrived about 10:30 p.m. and stayed until 1:00 a.m. While there, they drank and visited (T.1121-1124). Everyone described Skip and Brenda as having a good time and saw no problems, difficulties, fights, etc. (T.636,646,649,660,678,953).

They left the Earle Brown Bowl together and arrived home about 1:10 a.m. (T.1124). Skip hadn't eaten supper that evening so he went into the kitchen and fixed something to eat (T.1125). He laid down on the couch and watched television (T.1126). Skip fell asleep (T.1128), he woke up, he wasn't sure if it was Brenda who woke him up or something else (T.1130,1131), but he saw flames by the dining room window (T.1130). At this time, the house was full of smoke and extremely hot. Skip was confused and panicked. He saw Brenda heading towards the kitchen area and he ran out the "front door" (T.1130). After he left his home, the house burst into flames (T.1132).

As Skip came out the front door, his next-door neighbor, Charles Catron, came out his door (T.255). Skip started screaming for the fire department

(T.1135). Mr. Catron had come out because his wife woke him and told him of the fire next-door (T.242). Mr. Catron crawled into Skip's house, over an area the State contended gasoline was present (T.548), and got into the kitchen. He saw Brenda's feet but could not see the rest of her because the smoke was so heavy. He burned his finger on the metal strip that held the carpet down at the line between the dining room and kitchen (T.257-260) (Appendix, p.99).

When the police arrived, Skip was trying to put the fire out by using a garden hose (T.62-63). Officer Robert Adams of the Brooklyn Center Police Department was the first on the scene. Officer Debra Christman arrived later. When she arrived, the second story of the home was not aflame (T.82). Adams spent some time looking for a ladder to rescue anyone upstairs, including kicking in a

door to the caretaker's maintenance equipment garage (T.63). He found no ladder. Officer Adams kept calling the fire department to tell them how serious the fire was (T.61-62). The neighbors who reported the fire said that the fire fighters did not arrive until ten to thirty minutes after the fire was reported (T.229,283). The fire was initially under control until the pumper truck ran out of water (T.229,231,283-284). The fire was controlled approximately 35 minutes after the fire department arrived (Omnibus Hearing Transcript, p.46; T.728).

Because Skip's hysteria interfered with the fire fighters, Officer Adams took Skip to Skip's sister's home in Maple Grove. In the car ride, Officer Adams detected no odor of gasoline (T.77). While Skip was outside watching his home burn, a neighbor hugged him.

She detected no odor of gasoline (T.251). Officer Adams was later instructed to bring Skip Berndt back to the Brooklyn Center Police Department for interrogation. Officer Adams was instructed that Berndt had no choice to refuse and that he was to be treated as a suspect (O.H.T.16,101). The Brooklyn Center Fire Marshall considered the fire an arson based on of how much of the home was burning when the fire department arrived (T.719).

Skip told the officers what happened that evening (T.115-118). In the interview, Skip was wearing the same clothes he had on while at the scene (T.969). The left side of his arms and face were singed (T.1054). However, no one detected the odor of gasoline (T.1055). Skip Berndt's clothes were not confiscated (T.347). Skip was requested to and did consent to being taken to

North Memorial Medical Center to draw blood for purposes of evaluating the alcohol content (T.118-119). No one from the Medical Center testified to any gasoline odor on Berndt or his clothing. Berndt's family perished in the fire.

In reversing Berndt's convictions, the Minnesota Supreme Court gave due deference to the jury's verdict. Berndt, at 880. Accordingly, for the purpose of analysis, the Minnesota Supreme Court accepted the State's theory that five gallons of gasoline was used to start the fire.[1] Even after making such

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[1] At the trial, the State failed to disclose and deliver all of the "positive" chromatograms prepared by the State's chemist. In post-trial proceedings, the defense chemist testified that the withheld chromatograms showed contamination and an invalid chromatographic analysis of the fire samples. The chemist testified that the State's chemist manipulated the chromatographic readout to attempt to duplicate
(footnote continued next page)

assumption, the Court reversed because "[t]he state's entire case was bottomed on mere speculation or upon hypothesized 'facts' not in evidence." Berndt, at 880.

The following is just one example of the speculation the Minnesota Supreme Court rejected.

> Notwithstanding the absence of even a scintilla of evidence from any lay or professional witness of any concussion, blow, or fracture to Brenda's head, the state urged the jury to speculate that Berndt and his wife had fought that evening, resulting in a blow to Brenda's head sufficient to render her unconscious.

Berndt, at 881.

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gasoline. The defense chemist testified in post-trial proceedings that the withheld evidence showed how the State's chemist erroneously concluded gasoline was present in 5 of 26 samples taken from the home. The defense chemist testified in the post-trial proccedings that the State's method of analysis was not scientifically accepted (Appendix, pp.27-37,42-53,109-111).

In its Petition for Certiorari, the State asks this Court to engage in the same speculation previously rejected twice by the Minnesota Supreme Court. The State alleges the fire was motivated by financial gain. There was no evidence that Berndt knew of any life insurance on his wife. The evidence that was introduced suggests that Berndt did not know of the life insurance (T.118). In any event, the policy was little more than a burial policy. Berndt was not a named beneficiary; the insurance had been in existence since 1978; no increase in amount of insurance was ever requested; the policy was an automatic benefit of employment (T.706-709). The State also speculates with respect to a financial motive concerning the credit life car insurance. However, Berndt did not know the car loan was paid off after his wife's death (T.1244,1254). He had the

same type of loan in the five years preceding the fire. The credit life aspect of the loan was automatic and normal with Community Credit (T.695-697).

Although Berndt was not a wealthy man, he had just received a promotion with more pay (T.1116). Further, there was no evidence the bill collector was hounding him. Community Credit believed Berndt was financially stable. This was a normal two-income family with no proof they were financially overextended. Each had been divorced previously and knew how to end a marriage if either so desired. The State's invitation to the jury to speculate was properly rejected by the Minnesota Supreme Court.

The State also speculated that because Skip Berndt had been promiscuous in the past, he murdered his family. In its present petition, the State mentions that at the Earl Brown Bowl a female

friend of Berndt accompanied him to the parking lot to see his new used car. Even though she testified that nothing of a promiscuous nature happened, the State asks this Court to so speculate. The Minnesota Supreme Court dealt with that invitation as follows:

> Though admitting that in the years before the fire there had been problems between himself and Brenda because of his alleged philandering, the evidence was unrebutted that those disagreements had been ironed out long preceding the fire.

Berndt, at 880.

The State says Berndt could not have gotten out of the house without severe injury. However, the testimony of the State's own witness, Charles Catron, disproves that contention. Mr. Catron testified that Skip and he came out of their homes at the same time (T.255). However, Catron reentered Skip's home almost immediately (T.257). Catron

crawled through part of the same area Skip said he went over, an area the State claimed contained gasoline (T.257-259), and therefore impossible to crawl through or run over. Mr. Catron experienced only minor injuries (T.258). As a matter of fact, Mr. Catron got into the house as far as the metal strip separating the carpeted area from the linoleum area and to the feet of Brenda (T.258-259). If the State was correct, Charlie Catron could not have gotten into the house because he would first have had to go through burning gasoline vapors and very hot linoleum tile (Appendix, p.99). The jury viewed an experiment which showed linoleum tile burning with gasoline. The tile retained its high heat of over 700° for a long time. Charlie Catron would not have been able to get in. If the State's theory was right, Charlie Catron would have perished in the fire or been

severely disfigured. He wasn't. He experienced some singeing (consistent with Berndt's injuries) and only "burned" himself when he touched the metal stip (T.260). Contrary to the State's theory, he saw no flames in the kitchen or entry as he went in (T.269-270). Berndt's mother, sister, and Berndt testified to the condition and terrible pain of his feet (T.1144,1238,1253).

The State introduced evidence to show that Berndt, based on his consensual blood test, was intoxicated at the time of the fire. His blood alcohol content was estimated to be .13% at the time of the fire. Brenda's was .25%. The State also theorized that a minimum of five gallons of gasoline was used to start the fire. The State presented no evidence to link Berndt with any gasoline. The evidence that was introduced disproves such a link. The State says Berndt could

have siphoned some gasoline. No siphoning equipment was found. No one reported any gasoline missing from any cars. The caretaker said his gasoline was where it should be and didn't appear to be tampered with. However, the caretaker's gasoline was an oil mix. No gasoline container was found. The garbage dumpster was not searched. Even so, the State asked the jury to speculate and provide this missing information.

The State has no proof how the five gallons was spread. Was the five gallons carried in small containers of one gallon? If so, the process would take a great deal of time. First, one gallon would need to be siphoned; then transported to the house; then spread throughout the house. That process would need to be repeated five times with only two results. One, the chances of any of the occupants smelling the gasoline and

leaving is greatly enhanced. Two, the gasoline would vaporize a long time and the entire complex would explode and be destroyed.

If the State's theory is that the gasoline was spread quickly, an intoxicated man who had not slept in 21 hours would have spilled some on himself. However, no one smelled gasoline on him. The neighbor who consoled him at the scene did not smell any. The veteran police officer who was with Berndt in a closed car for about forty-five minutes smelled no gasoline. The chaplain and police officers who interrogated Berndt in a closed room smelled no gasoline. There was no evidence that any gasoline was noticed at the hospital. Even though Berndt had the same clothes on, they were not confiscated for analysis.

The State urges in its petition that this absence of proof is not crucial.

The State is wrong. Although some experts testified that it is not uncommon not to smell gasoline used to start a fire, i.e. gasoline that is already burning, they did not testify that if a person spilled some in spreading the gasoline, that it would not be smelled on the person. Trained firefighters testified that they were taught to scream "gasoline" if they smelled any while fighting a fire. At trial, a trained investigator and former police officer could still smell gasoline that was burned on Exhibit M months before trial (T.1287). The undisputed testimony is that gasoline upon being spread immediately starts to vaporize. Also, gasoline vapors are attracted to the groin and armpit areas. The gasoline vapors exhibit instantaneous ignition throughout the house. Had Berndt spread five gallons of gasoline, he would have

been covered by gasoline vapors and would have caught on fire. The testimony relied on by the State regarding set fires is not relevant because the substance was a gasoline/oil mixture which is considerably less odorous and explosive than gasoline (T.164). In any event, a fireman at the scene said the fire had an average amount of smoke and did not have rapid acceleration (T.159-160). He also said that gasoline used to start a fire can be smelled at the scene and that he hadn't considered that gasoline was used to start this fire even though he had been a firefighter for 16 years (T.162-163).

Finally, the evidence was undisputed that Berndt loved his children. The youngest one insisted on sitting on Berndt's lap at dinner at family gatherings. He coached the older two boys in Little League and had just

purchased them bicycles for their birthdays. The State speculated that killir the boys would make the wife's death appear more natural. The Minnesota Supreme Court rejected such speculation. The examinations of the bodies prove these deaths were the result of a terrible accidental fire. The State says gasoline was poured throughout the house, upstairs, downstairs, and in the bedrooms. Once gasoline is spread, it starts to vaporize. All of the vapors instantaneously ignite throughout the house like a chain reaction. The medical examiner testified that when one breathes superheated air, the lungs instantly burn and death follows without any further breathing and absorption of carbon monoxide. Therefore, if the State's speculation is correct, Brenda would not have had close to a fatal amount of carbon monoxide. She would have had

virtually none. Also, the boys would have breathed superheated air caused by the ignition of gasoline vapors in their rooms (T.935). They would have died with little, if any, carbon monoxide in their system. Rick had 75%, Corey had 72%, and Mike had 90% carbon monoxide. They died as the result of a smoldering fire. Brenda's level of 25% is indicative of awakening confused, smelling smoke, going downstairs, saying something to wake up Berndt, breathing superheated air and collapsing.

In finding the evidence so lacking, the Minnesota Supreme Court stated the following:

> Although police and fire officials essentially had exclusive control of the fire remains for at least four days after the fire, they found no containers which could have held the gasoline used as an accelerant, nor did they find siphoning equipment to link Berndt to this fire. Notwithstanding the absence of such

> tools, the state, by pure speculation, theorized either that (1) appellant had stolen the gas from the caretaker's supplies, or (2) appellant had siphoned the gas from cars in the parking lot, or (3) the reason no gas can or siphoning equipment was found was that in all probability Berndt had thrown it into a garbage dumpster which had been unloaded the morning after the fire.
>
> All three of those contentions were purely speculative with no factual basis. . . . In sum, nothing in the evidence justifies an inference establishing a nexus between appellant and the gasoline --at least 5 gallons of it --used to accelerate the townhouse fire.

Berndt, at 879.

C. **The State Of Minnesota Has Improperly Included Material That Is Dehors The Record.**

The State of Minnesota included material that was outside the appellate record in its petition for rehearing filed with the Minnesota Supreme Court and in its petition for Writ of Certiorari filed with this Court. There can be no justification for such improper

conduct. The Minnesota Supreme Court has so held:

> It is elementary that the supreme court is vested only with appellate jurisdiction . . . . Appeals, therefore, must be decided solely upon the evidence actually presented to the trial court and shown by the record on appeal . . . . Affidavits, filed or obtained after the trial, obviously could not have been presented to the trial court and are entitled to no place in the appellate record and briefs. Clearly, they may not be considered as part of the evidence by a court of review.

Holtberg v. Bommersbach, 235 Minn. 553, 51 N.W.2d 586, 587 (1952).

However, the State of Minnesota rationalized the appropriateness of this conduct by assuring the Minnesota Supreme Court that retrial was not prohibited and this information was merely to show the Minnesota Supreme Court that another trial would include different evidence. In its Petition for Writ of Certiorari, the State of Minnesota now assures this

Court that retrial is prohibited. But the State still includes material that is outside the record. There is no justification for this conduct. The State of Minnesota has alleged that Skip Berndt admitted setting the fire and that Professor Shelby Gallien is under investigation for his skills in fire investigation. Both of these allegations are false and the State of Minnesota has the necessary information to so show. Counsel for Respondent directs the Court to Respondent's Appendix which more fully sets out this rebuttal in Respondent's Opposition to Petition for Rehearing (Appendix, pp.121-186).

Skip Berndt is innocent of setting this fire. He said he was innocent during the one year the case was investigated by the State. He said he was innocent during the second year the case was prepared for trial. And he

maintained his innocence during the time he was in prison (Appendix, pp.175-177). The State of Minnesota asks this Court to assume jurisdiction based on the assertions of a person who has been convicted of the felonies of aggravated robbery with a gun on January 12, 1977; theft and attempted escape on February 29, 1980; escape on November 14, 1980; theft from person on January 12 1983; robbery on March 18, 1983; a second robbery on March 18, 1983; and escape on April 3, 1986. This individual also offered to lie for another inmate who was charged with a crime and awaiting trial (Appendix, p.186). This person said the only interest he had was to be transferred to Lino Lakes, a minimum security institution. He was. This person escaped from Lino Lakes in 1985. It defies logic that Berndt would "confess" to this stranger (Appendix,

pp.178-199). While watching a news program about an arson fire, Berndt's ambiguous statement of being charged with the same thing, in the mind of the ex-convict, becme an admission one year later when he had something to sell to the State. Clearly, if a defendant would present this type of material as a basis for a new trial, the State would not deem it worthy of response.

One of the State's witnesses, the fire marshall of Roseville, filed a complaint against Professor Shelby Gallien. The State argues that Professor Gallien changed his position during cross-examination. That is false. He simply stated that the fire investigators had not conducted a thorough enough investigation to rule out the various sources of accidental fire. The National Association of Fire Investigators honored Professor Gallien in August, 1985, as

their Man of the Year. The award was based on Professor Gallien's fifty years of service in the field. He was honored for his pioneering efforts in establishing fire schools and seminars and for his assistance in establishing the International Association of Arson Investigators and the National Association of Fire Investigators. The President of the National Association of Fire Investigators concluded the complaint was without merit and dismissed it (Appendix, pp.180-185). The President also concluded that the Roseville Fire Marshall lacked even an elementary understanding of the field of fire and arson investigation. The President advised that the Roseville Fire Marshall contact the International Association if he wished to continue the matter. However, the President informed the Roseville Fire Marshall that Professor

Gallien had suffered a series of debilitating strokes which have left him bedridden, blind, and without mental faculties (Appendix, p.181). Professor Gallien lives in a nursing home in his hometown. He is not avoiding investigation.

REASONS FOR DENYING THE WRIT

I. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW THE DECISION BELOW. NO FEDERAL QUESTION WAS FRAMED, RAISED, OR PRESENTED BY PETITIONER OR CONSIDERED BY THE COURT IN THE PROCEEDINGS BELOW. THE DECISION BELOW PRESENTS NO FEDERAL QUESTION.

Introduction

The State's position, simply put, is that anytime a party disagrees with a state court's decision, the United States Supreme Court has jurisdiction to review. The Supreme Court of the United States has no jurisdiction under 28 U.S.C. §1257 to review the decision of the Minnesota Supreme Court reversing Orville Berndt's conviction on grounds of evidentiary insufficiency.

> Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue . . . . But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state

> decision will be reviewed. **First**, the federal question must be a substantial question. **Second**, the federal question must have been properly raised in the state courts. . . . **Third**, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law.

Justice Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 393, 399-400 (1960) (emphasis added).

Considerations affecting the grant of certiorari in cases coming from state courts especially militate against review in this case. The decision below presents no federal question. No federal question was framed or raised by Petitioner in the state court proceedings. No federal question was presented to the Supreme Court of Minnesota in the proceedings below. No federal question was considered or decided by the Minnesota Supreme Court in the prior proceedings. Rather, the

decision below rests completely upon adequate and independent state grounds. No right, title, privilege, or immunity of the State of Minnesota is implicated by this decision. Petitioner failed to draft her jurisdictional statement in compliance with Rule 21.1(h). In addition, Petitioner's appeal is barred by the Double Jeopardy Clause. Finally, reversals for evidentiary insufficiency, based entirely upon adequate and independent state grounds, are matters of state law and are not reviewable by this Court.

A. **No Federal Question Was Framed, Raised, Or Presented By Petitioner Or Considered By The Court In The Proceedings Below.**

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication

that the federal question was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 497 (1981) (citations omitted).

Petitioner contends that "[t]he question presented herein is 'whether a state appellate court may reverse a criminal conviction on the ground of evidentiary insufficiency, thereby invoking the federal constitution's double jeopardy clause bar against retrial, where the evidence is legally sufficient to sustain the conviction . . . .'" Petitioner's Brief at 19. The question is subsequently rephrased to read: "The issue before this Court, therefore, is whether a state appellate court may label a legally sufficient conviction as insufficient, thereby invoking the federal constitution's double jeopardy bar against retrial." Id. at 23. The result of such a ruling,

according to Petitioner is to extend "the meaning of 'evidentiary insufficiency' and 'double jeopardy' beyond the scope of the fifth and fourteenth amendments." Id. at 19. In essence, Petitioner contends that a garden variety reversal for evidentiary insufficiency based entirely upon adequate and independent grounds constitutes a federal question, thereby invoking this Court's jurisdiction.

Notwithstanding the remarkable bootstrapping Petitioner engages in to fashion this specious "federal question," it is abundantly clear that no federal question constructed along these (or any other) lines was ever framed, raised, or presented, explicitly or by implication, to the Minnesota Supreme Court in the proceedings below. A review of the table of contents for the prosecution's Petition For Rehearing to the Minnesota

Supreme Court demonstrates Petitioner's failure to raise a federal question below. The issues raised by Petitioner below are as follows:

. . .

III.

IN HOLDING THAT THE EVIDENCE WAS INSUFFICIENT, THIS COURT OVERLOOKED AND MISCONCEIVED MATERIAL EVIDENCE IN THE CASE.

IV.

EXAMINATION OF THE MATERIAL EVIDENCE THAT WAS OVERLOOKED AND MISCONCEIVED BY THIS COURT MAKES CLEAR THAT THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO THE VERDICT WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICTS.

V.

BECAUSE THE EVIDENCE WAS TECHNICALLY SUFFICIENT TO SUSTAIN THE JURY'S VERDICTS, THE INTERESTS OF JUSTICE REQUIRE EITHER THAT THE VERDICTS BE REINSTATED OR THAT THE CASE BE REMANDED FOR TRIAL.

Petition For Rehearing, p. i.

The prosecution does assert in their petition for rehearing below that the double jeopardy clause permits the court

to rehear and remand the case for retrial. Petition For Rehearing, pp. 45,49. However, both contentions are subsidiary and supplemental to the prosecution's main argument that "[b]ecause the evidence was technically sufficient to sustain the jury's verdicts, the interests of justice require that the verdicts be reinstated or that the case be remanded for trial." Id. at 45 (emphasis added).[2] The main premise of the prosecution's argument to the Minnesota Supreme Court

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[2] The State's contention that a new trial would not result in a retrying of the same evidence can only be seen as a strategy calculated to allay any potential concern the lower court may have over defendant's rights under the federal Double Jeopardy Clause. Indeed, the State phrased this issue to read: "[r]emanding this case for retrial is permissible under the double jeopardy clause." Petition for Rehearing, p. 45. Petitioner now claims that the court's ruling below "will bar retrial unless it is
(footnote continued next page)

was simply that the evidence was sufficient. Id. at 49. Nowhere in their petition for rehearing does the State suggest or imply that reversal is mandated because of the presence of federal issues. In fact, they went to great lengths to assure the Court that a reinstatement of the verdict or remand for retrial would not run afoul of the Double Jeopardy Clause. But merely arguing that something is not prohibited or is permissive is not the equivalent of an assertion that it is required or compelled. The case was presented to the

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reversed." Petitioner's Brief at 23 (emphasis in original). That such a tactic could now give rise to a federal question is untenable. The Petitioner did not argue that the federal Double Jeopardy Clause required the Minnesota Supreme Court to sustain the trial court. As noted above, their only contention was that the evidence was sufficient to convict. This argument does not rest upon the Federal Constitution or prior decisions of this Court.

Minnesota Supreme Court solely on the grounds of whether the evidence was sufficient to convict.[3] It is "not enough [to acquire jurisdiction] that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature." Whitney v. California, 274 U.S. 357, 362 (1927); Dewey v. Des Moines, 173 U.S. 193, 199 (1899). "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

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[3] A recent case decided by the Minnesota Supreme Court shows that the Court is very sensitive to the type of constitutional issues petitioner claims are present in this case. See, State v. Gurske, ___ N.W.2d ___, slip. op. CX-86-777 (Minn. 1986). The holding In Gurske demonstrates that the Minnesota Supreme Court recognizes and decides federal issues when they arise.

The dearth of any federal question below is emphasized by Petitioner's failure to satisfy this Court's requirements as set forth in Rule 21.1(h). Under Rule 21.1(h), Petitioner's jurisdictional statement must "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them, and the way in which they were passed upon by the court . . . ." Petitioner fails to comply with these requirements. Nowhere does it appear in Petitioner's Statement of the Case where the federal question was raised, how it was raised, or how it was decided. The Petitioner simply never argued that the Minnesota Supreme Court's failure to reverse their evidentiary ruling would implicate federal concerns.

Indeed, they argued just the opposite. Their contention below was that the Federal Double Jeopardy Clause would not be implicated by retrial or reinstatement of the verdict. They did not argue that remand or reinstatement was required by Federal constitutional principles.

Petitioner also alleges that the court below erred in their use of a circumstantial evidence standard "more stringent than that required by the due process test." Petitioner's Brief at 24. Putting aside the merits of this claim, it is absolutely clear that Petitioner also failed to raise this issue below. Quite the contrary, in their Petition For Rehearing below, the State reminded the Court it had repeatedly held that:

> The circumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and

inconsistent with any rational hypothesis except that of his guilt.

Id. at 23.[4]

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[4] The State cites State v. Morgan, 290 Minn. 558, 561, 188 N.W.2d 917, 919 (1971), and State v. Jackson, 326 N.W.2d 663, 665 (Minn. 1982). This was the very evidentiary standard and supporting case law which appears in the decision below. Most importantly however, it is the very same standard which the State now says is a departure from the court's "own traditional evidentiary test." Petitioner's Brief at 24. It is incongruous for petitioner to urge one argument to the Minnesota Supreme Court below and subsequently urge the opposite argument before this Court. It is patently ridiculous to suggest, based upon what they actually argued and pointed out to the court below, that a federal issue was raised which condemns as somehow inconsistent with federal due process a standard of circumstantial evidence which petitioner itself urged upon the court below as controlling state law. In essence, petitioner argued below that such law was binding upon the court insofar as its considerations of evidentiary insufficiency were involved and now demands a reversal arguing this very same standard is precluded by federal constitutional law. This issue logically cannot have been raised below because petitioner was arguing in favor of its use by, and binding effect on, the Minnesota Supreme Court.

The crucial consideration is whether the record as a whole demonstrates, expressly or by implication, that the federal question was "brought to the attention of the state court with fair precision and in due time." New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

> At the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure . . . that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Webb v. Webb, 451 U.S. 493, 501 (1981). The Petitioner fails these tests utterly and abjectly as shown by Respondent's arguments, supra.

Additional proof illustrating

Petitioner's failure to raise a federal question below is available in the text of the court's opinion. Petitioner concedes that the opinion below makes no reference to federal issues. Petitioner's Brief at 19. A brief review of the opinion itself emphatically and conclusively proves that the sole basis for their ruling was evidentiary insufficiency. The court held that the prosecution's "entire case was bottomed on mere speculation or upon hypothesized 'facts' not in evidence . . . . About all the state produced to show appellant was the culprit was suspicion unsupported by facts." State v. Berndt, 392 N.W.2d 876, 881 (Minn. 1986). Clearly, the court was absolutely unconcerned with, and indeed totally unaware of, any issues of federal importance.

Moreover, the entire opinion rests upon adequate and independent state

grounds. The only references to controlling legal principles or prior judicial decisions involve Minnesota case law pertaining to evidentiary issues. Not one word in the opinion refers to any issue not governed by Minnesota law. No federal law of any kind is discussed, cited, or otherwise implicated in the court's opinion. A similar situation confronted this Court in Webb v. Webb. In that case, the Court stated:

> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon . . . . This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Id. at 496 (footnotes omitted).

Petitioner has not met this burden.

Where, as here, the judgment rests upon an adequate and independent state ground, namely, that the evidence was insufficient, the Supreme Court has no jurisdiction to review the case. Chief Justice Rehnquist, speaking for the majority in Wainwright v. Sykes, stated that "[a]s to the role of adequate and independent state grounds, it is a well-established principle of Federalism that a state decision resting upon an adequate foundation of state substantive law is immune from review in the federal courts." 433 U.S. 72, 81 (1977). Such garden variety state court judgments "not only cannot be overturned by, [but] indeed, are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such cases." Justice Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489,

501 (1977). The rationale

> is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

Principles of comity in our federal system require:

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways."

Younger v. Harris, 401 U.S. 37, 44 (1971).

In sum, when "there can be no pretense that the [state] Court adopted

its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." Nickel v. Cole, 256 U.S. 222, 225 (1921); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960)."If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Michigan v. Long, 463 U.S. 1032, 1041 (1983).

Petitioner also asserts that "the Minnesota Supreme Court's reversal was based on a standard more stringent than that required by the due process test

. . ." Petitioner's Brief at 24.[5] Petitioner erroneously claims that this standard of review was "explicitly rejected" by Jackson v. Virginia. But this too, is misleading. There is no language in Jackson even remotely intimating that this standard of circumstantial evidence is unconstitutional or that the states are forbidden to use it in their tribunals.[6]

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[5] The following circumstantial evidence standard was cited by the court below as applicable under Minnesota Law:

> The circumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.

State v. Berndt, 392 N.W.2d 876, 880 (Minn. 1986).

[6] Petitioner's reference to Holland v. U.S., 348 U.S. 121, 139-40 (1954), is (footnote continued next page)

Significantly, the Jackson standard is to be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." Jackson v. Virginia, 443 U.S. at 324 n. 16. This also includes reference to state evidentiary law. Moore v. Duckworth, 443 U.S. 713 (1979). See also, Scott v. Perini, 662 F.2d 428 (6th Cir. 1981), cert. denied 456 U.S. 909 (1982).[7] Thus, it is absolutely clear that the Minnesota standard pertaining to circumstantial evidence is

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similarly inapposite. The Court did not say that this standard was not permitted by federal law for use in state judiciaries.

7 In Scott v. Perini, the Court of Appeals noted in passing that Ohio still adhered to the same standard of circumstantial evidence as is at issue in this case. No mention is made by the court that the federal standard is inconsistent with the Ohio version. The standards simply coexist as part and parcel of our federal system.

purely a matter of state law which presents no conflict with federal law in the context of this case.[8] In addition, it is apparent that this standard was not the dispositive factor in the court's decision to reverse respondent's conviction. Immediately following their recitation of the standard, the court states that "[e]xcept for the fact that appellant was physically present in his home when the fire started, there exist no other circumstances consistent with the state's hypothesis of guilt." State v. Berndt, 392 N.W.2d at 880 (emphasis added). In other words, even though the

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[8] A great deal has been written concerning the relative weight to be assigned to direct and circumstantial evidence. See I Wigmore on Evidence §26 (3rd ed. 1940). However that debate is eventually resolved, it is clear that a state may adopt an evidentiary standard (as Minnesota has done) which merely distinguishes between circumstantial and direct evidence.

court also found that "all of the circumstances [were] consistent with a rational hypothesis other than guilt," the state simply failed to prove that the circumstances were consistent with guilt. Id. In view of the foregoing, Petitioner can hardly assert that the use of this standard imposed an impermissible burden upon the prosecution.

B. The Decision Below Presents No Federal Question.

The decision below presents no federal question for review by this Court simply because Petitioner has no federal "title, right, privilege or immunity" which has been abridged by the Minnesota Supreme Court's ruling.

Petitioner erroneously claims that a federal question is presented by virtue of this Court's holding in Jackson v. Virginia, 443 U.S. 307, reh. denied, 444 U.S. 890 (1979). Jackson held that

> A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilty beyond a reasonable doubt states a federal constitutional claim.

Id. at 322. This language does not stand for the proposition that a prosecutor has a right under the federal constitution to challenge an acquittal based solely upon grounds of evidentiary insufficiency. The federal right in Jackson belonged to the defendant who was appealing his conviction on grounds of evidentiary insufficiency. This does not mean that a prosecutor has a federal right to appeal an acquittal grounded solely on state law by claiming that the evidence was sufficient to convict. This Court noted in U.S. v. Wilson, 420 U.S. 332 (1975), that:

> [a] system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have bene-

> fited from instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position in the past, and we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal.

Id. at 352.

This Court in Jackson did not address, and was totally unconcerned with, the ability of the prosecution in a state criminal case to appeal a ruling from a state high court in favor of a defendant. Rather, the opinion demonstrates that it was the potential for state intrusion upon the federal constitutional rights of the defendant which commanded their attention.[9]

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9 Although state appellate review undoubtedly will serve in the vast majority of cases to vindicate the due process protection that follows from Winship . . . . [i]t is the occasional abuse that the federal writ of habeas corpus stands ready to correct." Jackson v. Virginia, 443 U.S. at 322.

It is this concern which provided the basis for the presence of a federal question in Jackson. As stated by Mr. Chief Justice Rehnquist in U.S. v. Inadi, ___ U.S. ___, 106 S.Ct. 1121 (1986), a case "must be read consistently with the question it answered, the authority it cited, and its own facts." Id. at 1126. Petitioner's misuse of Jackson as support for the existence of a federal question in this case is erroneous, disrespectful, and misleading.[10]

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10 Petitioner also attempts to mislead the Court in stating that the "propriety of a state court ruling on the sufficiency of the evidence in a criminal case is a proper matter for federal appellate review." Petitioner's Brief at 28. Five cases are cited for this proposition. However, none of the authority cited supports Petitioner's contention in this case. U.S. v. Wilson and U.S. v. DiFrancesco, are inapposite as they do not involve review of rulings of evidentiary insufficiency. Rojas, DeGarces and Steed are not dispositive as they all (footnote continued next page)

C. **The State Of Minnesota Waived Any Objection To Alleged Nondelivery Of Trial Exhibits By Choosing To Remain Silent In Response To The Trial Court Clerk's List Of Exhibits Transmitted To The Supreme Court And By Not Personally Ensuring Such Delivery.**

Minnesota law is clear. A party who wishes to utilize a portion of the record " . . . bears the burden of taking the necessary steps to have the clerk of the trial court forward the original file to the Supreme Court." Holtberg v. Bommersbach, 235 Minn. 553, 51 N.W.2d 586, 588 (1952). Even though the trial court clerk has a duty to transmit the record, that duty does not extend to large or heavy items:

> A party shall make advance arrangements with the clerk for

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involved governmental appeals in federal court predicated upon 18 U.S.C. §3731, which has been held not to apply to state court rulings. See People of the Territory of Guam v. Okada, 694 F.2d 565, 567 (9th Cir. 1982), cert. denied 469 U.S. 1021 (1984).

> the delivery of bulky or weighty exhibits and for the cost of transporting them to and from the appellate courts.

Rule 111.01, Minn. R. Civ. App. Proc.

On May 14, 1985, the clerk of the trial court prepared the list of exhibits delivered to the Minnesota Surpeme Court and sent " . . . a copy of this list to all parties." Rule 111.01, Minn. R. Civ. App. Proc. Regardless of whether this rule implicates a federal issue, the State, nonetheless, has a legitimate interest in its own procedural rules. Henry v. Mississippi, 379 U.S. 443 (1965), reh. denied 380 U.S. 926 (1965). The list clearly shows what was delivered. Perhaps counsel for the State thought it was better that the Supreme Court not receive some exhibits. In any event, counsel chose to remain silent. The floor plans were included in Appellant's Brief to the Minnesota Supreme Court. The State has waived any

possible objection by waiting until after the Minnesota Supreme Court decision to raise any objection.

II. PETITIONER'S APPEAL IS BARRED BY THE DOUBLE JEOPARDY CLAUSE.

Even assuming, arguendo, the presence of a federal question, petitioner's appeal to this Court is barred by the federal constitution's Double Jeopardy Clause. An order or judgment that evidence is legally insufficient to sustain a verdict of guilt amounts to an acquittal for purposes of the Double Jeopardy Clause. See United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). If a trial court enters a judgment or order constituting an acquittal, an appeal by the prosecution is barred by the Double Jeopardy Clause not only when there is potential for a second trial, but also if reversal would result in further

proceedings for resolution of factual issues going to the elements of the charged crime. See Martin Linen, supra; Smalis v. Pennsylvania, ___ U.S. ___, 106 S.Ct. 1745 (1986) (dicta).

These rulings preclude this appeal by Petitioner since it is apparent that such an appeal, if successful, would necessarily be followed by further proceedings to resolve factual issues germane to elements of the crime charged.[11] Because further proceedings evaluating this evidence would be required upon remand, the Double Jeopardy

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[11] Indeed, Petitioner's Brief argues as much. In their Statement of the Case, Petitioner points out that "[t]he prosecution further informed the Minnesota Supreme Court that a new trial would not result in a retrying of the same evidence since new evidence supporting respondent's guilt had come to light since his original conviction." Petitioner's Brief at 17.

Clause bars this appeal.[12] As stated by Chief Justice Rehnquist in U.S. v. Jenkins, 420 U.S. 358, 370 (1975),

> [i]t is enough for the purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues . . . would have been required upon reversal and remand . . . . To subject [defendant] to any further such proceedings at this stage would violate the Double Jeopardy Clause.

Finally, it is not clear that the Supreme Court would permit review of state court rulings based upon evidentiary insufficiency irrespective of whether additional proceedings would be required. Verdicts of acquittal based upon evidentiary insufficiency have occupied a special place in the decisions

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12 There is no authority to review state court decisions based upon reversals for evidentiary insufficiency. All cases cited by petitioner for the proposition that their appeal is not barred are federal cases arising under 18 U.S.C. §3731.

of this Court. This concern is especially visible in Burks v. U.S., 437 U.S. 1 (1978). In Burks, the Court distinguished between reversals due to trial error and those due to evidentiary insufficiency. The Court observed that:

> "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. . . . [T]he same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not even have been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not have

> returned a verdict of guilty." (Emphasis added).

Id. at 16. Justice Brennan, dissenting in U.S. v. Difrancesco, observed that "[t]he Court, of course, acknowledges that verdicts of acquittal are not appealable." 449 U.S. 117, 143 n. 10 (1980).

Further, if the Court did decide this question in the affirmative, it is unlikely it would extend the scope of such a decision to include appeals brought in federal court by state prosecuting entities challenging decisions rendered by state tribunals acquitting defendants on grounds of evidentiary insufficiency.

> The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to

> live in a continuing state of anxiety and insecurity . . . ."

Green v. U.S., 355 U.S. 184, 187 (1957). To sanction appeals by state prosecuting entities from state court rulings of the type involved here would result in giving the state yet one more opportunity to convict a defendant. Even if such a result would be permissible within the federal system, it surely would be inappropriate where this Court is asked to review a state court judgment resting entirely upon independent and adequate state grounds.

CONCLUSION

The State of Minnesota is unhappy with the unanimous decision of the Minnesota Supreme Court. However, unhappiness is not sufficient to vest jurisdiction in this Court. The State argues that Minnesota's standard regarding circumstantial evidence implicates a federal issue. The State never advanced this argument below. Indeed, the State accepted this standard and argued that the evidence was sufficient. However, the Minnesota Supreme Court's decision did not turn on this standard. The Court below reversed because the case "was bottomed on mere speculation or upon hypothesized 'facts' not in evidence." Berndt, at 880.

The State of Minnesota has also engaged in other misrepresentations in these proceedings. The State assured the

Minnesota Supreme Court that retrial was permissible under the Double Jeopardy Clause. The State now says retrial is prohibited. In the lower court, the State introduced evidence outside the record and not presented at trial (an admission that the evidence was insufficient to sustain the convictions). The State argued this was done in good faith to show that a retrial would include additional evidence. Now that the State believes retrial is prohibited, what good faith argument does the State advance to include material that is dehors the record? It can only be in an attempt to improperly influence this Court.

In the Petition For Rehearing below, the State did not raise or cite any federal issue involved in the decision. The Minnesota Supreme Court's decision did not rest on or construe any federal

issue. This case turns solely on its own facts and upon adequate and independent state grounds. It affects only the parties involved, and therefore has no precedential value.

Finally, the State argues the Double Jeopardy Clause through the Fourteenth Amendment is implicated. However, the "right, title, privilege, or immunity" of the Double Jeopardy Clause applies to "persons", i.e. defendants. The Double Jeopardy Clause is a prohibition on the State. Consequently, no such right, title, privilege or immunity of the State is implicated. Accordingly, this Court should decline review.

Respondent respectfully requests that this Court decline review.

Respectfully submitted,

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DATED: this 24th day of November, 1986.